Supreme Court, U.S.
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No. 06-779

In The
Supreme Court of the United States

UNIVERSITY OF PUERTO RICO,

Petitioner,

v.

IVÁN TOLEDO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a claim against a State arising in the context of public higher education is based on Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165v, but does not involve conduct that infringes a constitutional right or some other interest subject to heightened scrutiny, does sovereign immunity bar a claim for damages?

PARTIES TO THE PROCEEDINGS

The appellants below were: the University of Puerto Rico; Mr. Jorge Sánchez-Rivera, in his official capacity as Deputy President of the U.P.R.; Mr. George V. Hillyer, in his official capacity as Chancellor of the U.P.R.; Mr. John Hertz, in his official capacity as Dean of the U.P.R. School of Architecture; Mr. Pedro Parrilla, in his official capacity as Counselor; Ms. Sonia Bazán, in her official capacity as Professor of Design; and Mr. Nathaniel Fuster, in his official capacity as Professor of Design and President of the Design Committee. The appellee below was Mr. Iván Toledo.

The United States intervened below in order to defend the constitutionality of the federal statute in question, 42 U.S.C.A. § 12202. Furthermore, please note that the Public Justice Center filed an *amicus* brief.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit reversing the District Court's judgment (App. 1-25) was entered on July 6, 2006, and is reported at *Toledo v. Sánchez,* 454 F.3d 24 (1st Cir. 2006). The opinion of the District Court denying Petitioner's motion to dismiss (App. 26-34), was entered on January 14, 2005, and is unreported.

JURISDICTION

The decision of the Court of Appeals was entered on July 6, 2006. (App. 2). On September 27, 2006, this Honorable Court granted an extension of time until December 3, 2006, to file the instant petition. Because December 3 is a Sunday, the deadline for filing this petition falls on Monday, December 4, 2006. Sup. Ct. R. 30.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

1. The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. amend. XI.

2. Section 1 of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

3. Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

4. Section 502 of the Americans with Disabilities Act of 1990 provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State." 42 U.S.C.A. § 12202 (Westlaw 2006 through P.L. 109-374).

STATEMENT OF THE CASE

A. Nature of the Case

Respondent Iván Toledo was a student at the School of Architecture of the University of Puerto Rico, Río Piedras Campus. He filed suit seeking damages and injunctive relief against the University and several of its employees

and officers based on the alleged violation of various federal and Commonwealth statutes, including Title II of the ADA, which requires States not only to refrain from discriminating against the disabled in the provision of public services, but also to furnish reasonable accommodations to such persons. His complaint did not raise any constitutional claims or, indeed, any claims requiring heightened scrutiny.

As the Court of Appeals held, there is no controversy that the University of Puerto Rico is an arm of the Commonwealth of Puerto Rico, and is therefore protected by the Commonwealth's immunity as a sovereign from suits for money damages by individuals. 454 F.3d at 31 n.1 (App. 5 n.1). Title II of the ADA, however, is expressly intended not only to impose certain obligations on public entities, including State governments, but also to abrogate their sovereign immunity from liability for claims for money damages. 42 U.S.C.A. § 12202. The specific issue here is whether Congress's attempt to subject States to monetary liability for violations of Title II by State universities is a permissible exercise of its § 5 powers.

B. Proceedings Below

1. U.S. District Court For The District Of Puerto Rico

In Respondent Toledo's original and subsequent amended complaints,[1] he alleged that he suffered from a

[1] The most current version of the complaint is the Third Amended Complaint, which Respondent Toledo filed with the District Court's permission on February 14, 2005 (U.S. District Court for the District of Puerto Rico, Civil Case No. 01-1980 (SEC), Docket No. 109).

mental disability (specifically, a schizoaffective disorder), and that because Petitioner failed to provide him with reasonable accommodation, he was forced to drop out of the architecture program. Respondent's claims were premised on alleged violations of various state and federal statutes, including Title II of the ADA, 42 U.S.C. §§ 12131-12165v, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794(a); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Civil Rights Act of 1870, 42 U.S.C.A. § 1983, as well as of the Constitution of the Commonwealth of Puerto Rico. Toledo did not, however, assert any federal constitutional claims or other claims requiring heightened scrutiny. He requested injunctive relief, compensatory damages, punitive damages, attorneys' fees, and costs.

At the beginning of the case, defendants filed several motions to dismiss based on Fed. R. Civ. P. 12(b)(6) and the Eleventh Amendment. On August 28, 2002, the District Court dismissed Toledo's Title VII claims against all defendants under Title VII, as well as his § 1983 claims against the Commonwealth of Puerto Rico and the individual defendants in their official capacities. The District Court denied, however, the motions to dismiss the § 1983 claims against the individual-capacity defendants.

Initially, the District Court held in abeyance its ruling on the request for dismissal of plaintiff's claim for monetary damages against the University of Puerto Rico and the official-capacity defendants under Title II of the ADA. After the parties further briefed the issue, the District Court dismissed Toledo's ADA Title II claims against defendants on September 8, 2003. On January 14, 2005, however, the District Court reinstated those claims, in light of this Court's intervening ruling in *Tennessee v.*

Lane, 541 U.S. 509 (2004). The University and the official-capacity defendants requested reconsideration of this new ruling, but the Court denied it on February 2, 2005. On February 11, 2005, they filed an interlocutory appeal to the First Circuit from the District Court's January 14 ruling.

2. U.S. Court Of Appeals For The First Circuit

On July 6, 2006, the Court of Appeals affirmed the District Court's January 14, 2005 ruling. 454 F.3d at 30 (App. 3). The Court of Appeals found that Respondent Toledo's complaint was sufficient to state a claim for the violation of Title II of the ADA. *Id.* at 32 (App. 8-9). It found, however, that his complaint did not state any constitutional claims.

With respect to the Due Process Clause, the First Circuit noted that, "because Toledo voluntarily left the architecture program at the University, his Title II claims raise no due process concerns." *Id.* at 33 (App. 9). And with respect to the Equal Protection Clause, the court went even further, commenting that, "[e]ven reading Toledo's complaint generously, he has failed to allege that the University's failure to accommodate his situation was due to irrational prejudice and, indeed, *rational bases for the actions are apparent from the face of the complaint.*" *Id.* at 33 (App. 11) (emphasis added). Toledo did not move for rehearing of these findings.

The Court of Appeals then framed as follows the issue it was to decide: "[b]ecause Toledo has stated a claim that the University violated Title II but not the Fourteenth Amendment, we must address whether Congress's abrogation of sovereign immunity as to that class of conduct is

valid as a prophylactic measure within Congress's § 5 power." *Id.* at 34 (App. 12). The Court of Appeals thus engaged in the three-step analysis prescribed by *City of Boerne v. Flores*, 521 U.S. 507 (1997), in which this Court held that because the power of Congress under § 5 of the Fourteenth Amendment to enforce the substantive provisions of that Amendment was remedial, not substantive, if the exercise of that power was to be "appropriate," it had to be congruent and proportional to the evidence of constitutional violations considered by Congress.

The Court of Appeals first determined what constitutional right Congress was seeking to enforce by means of Title II of the ADA. The Court of Appeals observed that the disabled do not constitute a suspect class for equal protection purposes, so that classifications based on disability are subject to rational-basis scrutiny. 454 F.3d at 33 (App. 10) (citing *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 448-50 (1985)). The Court of Appeals noted that this Court has held that not even primary education is a fundamental right, so that any claim for deprivation of education is subject only to rational basis scrutiny. 454 F.3d at 33 (App. 10) (citing *San Antonio Indep. Sch. Dist. v. Rodríguez*, 411 U.S. 1, 35-37 (1973)). The Court of Appeals therefore concluded that the right sought to be enforced was the right of the disabled to be free from irrational disability discrimination.[2]

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[2] Please note, again, that the Court of Appeals found that Respondent's Complaint did not even suffice to state a claim of irrational discrimination.

The Court of Appeals then sought to determine what evidence Congress had found of violations of the constitutional right identified in the first step. Here, the court concluded that Congress had been presented with extensive evidence that disabled children's right to be free of irrational disability discrimination had been violated frequently by school boards across the nation. The court below did not, however, indicate whether Congress had found any instances of irrational discrimination against the disabled at the public university level. In deciding whether it should frame the issue as one involving irrational disability discrimination "public education," in general, as opposed to in "public higher education," the court simply followed this Court's lead in *Lane*, in which this Court stated that "our cases have recognized that evidence of constitutional violations on the part of non-state governmental actors is relevant to the § 5 inquiry." *Id.* 454 F.3d at 37 n.4 (App. 18) (quoting *Tennessee v. Lane*, 541 U.S. 509, 527 n.16 (2004)).

The third step of the Court of Appeals' analysis was to determine "whether the provisions of Title II, as applied to public educational institutions, are a congruent and proportional response to this history and pattern of unconstitutional discrimination." The court focused on the operative provisions of Title II as a whole, as opposed to the specific remedy of abrogation, and found that these provisions were "justified by the persistent pattern of exclusion and irrational treatment of disabled students in public education, coupled with the gravity of the harm worked by such discrimination." 434 F.3d at 40 (App. 24). The court therefore affirmed the denial of the University's motion for summary judgment.

REASONS FOR GRANTING THE WRIT

This case presents this Court with an opportunity to clarify an extremely important area of the law that, although addressed by this Court several times over the last few years, remains stubbornly impervious to uniform interpretation and application by the lower courts; namely, whether (and, if so, under what circumstances) Congress is empowered to abrogate the States' immunity from damages claims based on the violation of federal statutory duties, when the underlying State conduct does not independently give rise to a claim for the infringement of a constitutional right – or even some other interest subject to heightened scrutiny.

This Court has *never* found that Congress has that power. To the contrary, the only cases in which this Court has upheld the validity of Section 502 of the ADA were those in which the underlying conduct gave rise to constitutional claims subject to heightened scrutiny: the fundamental right of access to the court, in *Lane*; the right to be free from discrimination based on gender, which is subject to intermediate scrutiny, in *Nevada Dep't of Human Resources v. Hibbs,* 538 U.S. 721 (2003); and the Eighth Amendment right to be free of cruel and unusual punishments, in *United States v. Georgia*, 126 S. Ct. 877 (2006). As Justice Scalia wrote for the Court in *Georgia*: "[w]hile the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers, . . . no one doubts that § 5 grants Congress to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of these provisions." 126 S. Ct. at 881 (emphasis in original).

In the other cases – *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); and *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) – the underlying conduct clearly did not involve actual violations of the substantive provisions of the Fourteenth Amendment. Unsurprisingly, the Court found that Congress's attempts to abrogate sovereign immunity in those cases were ineffective.

Nevertheless, this Court expressly left open this question in *Lane* and in *Georgia*. In *Lane*, for example, the Court noted that "[b]ecause this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*'s prohibition on irrational discrimination." 541 U.S. at 533 n.20. Similarly, in *Georgia*, the Court left open the question whether "insofar as [State] misconduct violated Title II but did not violate the Fourteenth Amendment, . . . Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." 126 S. Ct. at 882.

In the wake of this Court's precedents, the lower courts have been cast into confusion and disagreement. With respect to the question presented here, for example, the Eighth Circuit concluded that in cases in which there is no claim of underlying constitutional violation, Title II does not validly abrogate the States' sovereign immunity, whereas the First, Fourth, and Eleventh Circuits reached the contrary conclusion. *Compare Klingler v. Director, Dep't of Revenue*, 455 F.3d 888 (8th Cir. 2006), *with Toledo, supra*; *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005); *Association for Disabled Ams., Inc. v. Florida Int'l Univ.*, 405 F.3d 954,

958 (11th Cir. 2005). Moreover, both the Third and Eleventh Circuits originally adopted positions identical to the Eighth's, although they later vacated those decisions in order to remand the matters to the district court level for further development of the record, in view of this Court's ruling in *Georgia*. *See Cochran v. Pinchak*, 401 F.3d 184, 193 (3d Cir.), *vacated on other grounds,* 412 F.3d 500 (3d Cir. 2005); *Miller v. King*, 348 F.3d 1248, 1274 (11th Cir. 2004), *vacated on other grounds*, 449 F.3d 1149 (11th Cir. 2006). Finally, several district courts have adopted positions identical in substance to the Eighth Circuit's. *See* cases cited *infra*, at 12-13. This Court's guidance is clearly called for.

This case will also permit this Court to clarify several subsidiary questions, all of which are implicit in the main question presented, regarding the manner in which the *City of Boerne* "congruence and proportionality" test should be applied in the context of Congress's attempts to abrogate State sovereign immunity through the exercise of its § 5 powers. The sheer number of judicial opinions issued on this subject in the past few years is eloquent testimony to the need for guidance from this Court.

A. The Circuits Are Divided Over Whether (And If So, Under What Circumstances) Title II Of The ADA Can Overcome State Sovereign Immunity When The Underlying Claims Are Not Subject To Heightened Scrutiny Or Do Not Independently Constitute Constitutional Violations

1. This Case Squarely Presents The Conflict

The First Circuit correctly determined that the conduct of which Respondent complains does not constitute a

violation of the substantive rights protected by the Fourteenth Amendment. Furthermore, the interests he seeks to protect are not fundamental, and thus, even if his Complaint had stated a claim for their violation, they would have been subject only to rational basis scrutiny. Consequently, this case squarely presents the conflict: the existence *vel non* of sovereign immunity in this case will depend on whether Congress has the power to abrogate sovereign immunity even when the conduct does not constitute an independent violation of the substantive provisions of the Fourteenth Amendment, and even though Congress did not identify a widespread pattern of constitutional violations by State universities.

The First Circuit's decision below conflicts with the recent decision from the Eighth Circuit in a case that did not involve higher education, but in which the underlying conduct also implicated only the Equal Protection Clause's right not to be subjected to irrational discrimination, the Eighth Circuit stated that it did "not think that the rights and remedies that Title II creates are an appropriate means of enforcement of the equal protection rights of disabled people." *See Klingler*, 455 F.3d at 896. Critical to the Eighth Circuit's analysis was the fact that the underlying conduct did not independently violate the Fourteenth Amendment. "The fact that the ADA's scheme forbids [a state fee that was not unconstitutional] convinces us that, rather than seeking to enforce the Constitution's guarantee against irrational discrimination based on disability, Congress was seeking to redefine the protection offered by the Constitution." *Id.* at 896-897. The court therefore concluded that "Title II did not validly abrogate Missouri's sovereign immunity in the context of these challenges." *Id.* at 897.

The Eighth Circuit is not alone. Several district courts have also interpreted *Lane* as not permitting abrogation of State sovereign immunity unless the conduct complained of also constituted an independent violation of the Fourteenth Amendment or gave rise to a claim subject to heightened scrutiny. *See, e.g.*, *Doe v. Bd. of Trustees of the Univ. of Ill.*, 429 F. Supp. 2d 930, 939 (N.D. Ill. 2006) (because education is not a fundamental right, "Title II, as applied to the postgraduate state university program at issue in this case, exceeds Congress's power under section five"); *Press v. State Univ. of N.Y. at Stony Brook*, 388 F. Supp. 2d 127, 134 (E.D.N.Y. 2005) ("the application of Title II to a case involving a State's alleged denial of access to post-secondary education on the basis of disability, is an abuse of the Section 5 power of Congress."); *Buchanan v. Maine*, 377 F. Supp. 2d 276, 278 (D. Me. 2005) ("*Lane* does not extend to non-fundamental, though important, rights protected by Title II."); *Johnson v. S. Conn. State Univ.*, 2004 WL 2377225, at *4 (D. Conn. Sept. 30, 2004) (higher education case; "in the wake of *Lane*, it appears that a private suit for money damages under Title II of the ADA may be maintained against a state only if the plaintiff can establish that the Title II violation involved a fundamental right."); *McNulty v. Bd. of Ed. of Calvert Cty.*, 2004 WL 1554401, at *3 (D. Md. July 8, 2004) ("education is not a fundamental right for the purposes of Title II, and therefore, States continue to enjoy Eleventh Amendment immunity from suits for money damages."); *Roe v. Johnson*, 334 F. Supp. 2d 415, 422 (S.D.N.Y. 2004) ("Because of the absence of legislative findings establishing a pattern of unconstitutional discrimination in [the] context [the granting of licenses to professionals], this application of Title II is not a valid exercise of congressional power under

Section 5 and does not abrogate a state's Eleventh Amendment immunity.").

Furthermore, two other circuits originally took positions identical to the Eighth's, although they have since vacated their initial positions and remanded the cases to the trial courts, in order to develop the records, in accordance with this Court's ruling in *Georgia*.[3] Thus, for example, the Third Circuit initially ruled that Title II does not validly abrogate State sovereign immunity with respect to claims filed by disabled prison inmates, but later vacated the opinion in order to await this Court's ruling in *Georgia*. *See Cochran*, 401 F.3d at 193, *vacated on other grounds,* 412 F.3d 500 (3d Cir. 2005). No further ruling in *Cochran* has been handed down since *Georgia* was decided.

Similarly, the Eleventh Circuit ruled, in view of *Lane*, and before *Georgia* was decided, that "Title II prohibits far more state conduct and in many more areas of prison administration than conceivably necessary to enforce the Eighth Amendment's ban on cruel and unusual punishment." *Miller*, 348 F.3d at 1274, *vacated on other grounds*, 449 F.3d 1149 (11th Cir. 2006). Afterwards, however, the Eleventh Circuit vacated its initial opinion and remanded the case to the District Court, "with instructions to permit Miller to amend his complaint and then for further proceedings consistent with the Supreme Court's decision in *Georgia*." *Miller*, 449 F.3d at 1151.

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[3] Earlier this year, and also in light of *Georgia*, the Tenth Circuit remanded the matter before deciding it. *See Guttman v. Khalsa*, 446 F.3d 1027, 1034 (10th Cir. 2006) (reversing entry of summary judgment in favor of State defendant, and remanding for development of record).

In addition, although the Fifth Circuit has, so far, declined to rule on this question, *see Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 287 (5th Cir. 2005), six of its judges would have held "that ADA Title II, apart from the *Lane* scenario, does not validly abrogate States' Eleventh Amendment immunity," *id.* at 303 (concurring and dissenting opinion). It is also possible that the majority of the Fifth Circuit's judges would agree with that position, to judge from one the reasons given in the *en banc* court's opinion for declining to rule on the issue: "Because . . . the Supreme Court has never before recognized access to public education or freedom from disability discrimination in education to be fundamental rights, . . . we do not address whether the holding in *Lane* extends to disability discrimination in access to public education." *Id.* at 287.

The Second, Sixth, and Seventh Circuits appear not to have squarely addressed this issue in any opinions after *Lane* and *Georgia* were handed down.

On the other hand, the First Circuit's ruling is consistent with the decisions handed down by the Fourth and Eleventh Circuits, which relied on this Court's ruling in *Lane* to hold that Title II of the ADA validly abrogates the States' sovereign immunity in the context of public higher education, even where the underlying state conduct did not violate the Constitution or infringe interests subject to anything more than rational-basis scrutiny. *See Constantine*, 411 F.3d at 490; *Association for Disabled Ams., Inc.*, 405 F.3d at 958. Moreover, although in a case not involving higher education, and without analyzing *Lane* in any detail, the Ninth Circuit recently reaffirmed its precedents that held that Title II validly abrogates State sovereign immunity under almost all circumstances. *See Phiffer v.*

Columbia River Corr. Inst., 384 F.3d 791, 792-793 (9th Cir. 2004).

In sum, there is widespread conflict and confusion among the lower courts as to the existence and scope of Congress's power to adopt prophylactic measures to punish violations of Title II that do not otherwise constitute violations of fundamental rights (or of other interests that would trigger heightened scrutiny).

2. The Issue Presented By The Conflict Is Recurring And Of Great Importance

The importance of the issue presented is self-evident: "[t]he States . . . retain 'a residuary and inviolable sovereignty.' . . . They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting The Federalist No. 39 (Madison)). In that regard, "[t]he [Eleventh] Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Moreover, the implications of the issue presented to the Court today are the same as those involved in other sovereign immunity cases this Court has heard in the past:

> Underlying constitutional form are considerations of great substance. . . . A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources

> among competing needs and interests lies at the heart of the political process. While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

Alden, 527 U.S. 750-751. These observations have lost none of their potency.

Furthermore, the issue presented will recur until this Court resolves it. As discussed in the next section, the current mode of analysis employed by this Court to determine whether a given attempt by Congress to abrogate State sovereign immunity is an appropriate exercise of its § 5 powers needs to be clarified, if only for the sake of avoiding unnecessary litigation.

B. The Decision Below Reflects Widespread Uncertainty Over The Manner In Which This Court's Rulings In *City Of Boerne*, *Florida Prepaid*, *Garrett*, *Kimel*, *Lane*, *Hibbs*, And *Georgia* Can Be Reconciled

Various commentators have noted that this Court's precedents applicable to the question presented in this petition are not easy to reconcile and have led to much confusion. *See, e.g.*, Denise C. Morgan, *A Tale of (At Least)*

Two Federalisms, 50 N.Y.L. Sch. L. Rev. 615, 615 (2006) ("[e]verything about the area of the law now seems to be in flux"); Mollie Nolan, Note, *A Difference of Opinion: Reconciling the Court's Decision in* Tennessee v. Lane, 30 S. Ill. U. L.J. 357, 391 (2004) ("The *Lane* decision left so much of Title II still open with respect to Eleventh Amendment immunity abrogation and arguably contradicts *Garrett*, so a circuit split is not only likely, but already developing."); David L. Schwan, Note, *When You Come to a Fork in the Road, Take it!: Tennessee v. Lane Takes a New Approach to Section 5 Enforcement Powers*, 43 Hous. L. Rev. 235, 267 (2006) ("Although many courts construe *Lane* to compel a right-by-right approach to Title II, lower courts have not done so uniformly. This split threatens to grow larger, due in part to the Court's failure to mandate the contextual analysis to Title II.").

The most important among the questions that remain unanswered is the one presented in this petition, but there are several other subsidiary questions that also deserve attention. *See, generally*, William E. Thro, *Toward a Simpler Standard for Abrogating Sovereign Immunity*, 6 Engage: The Journal of the Federalist Society's Practice Groups 65 (October 2005). First, in determining proportionality, should the pattern of constitutional violations presumably identified by Congress be balanced against the abrogation of sovereign immunity, or against the substantive provisions of the statute in question? In *Florida Prepaid*, the answer was: the former. In *Lane*, however, the Court balanced the constitutional violations against the substantive provisions of Title II of the ADA. One of the two approaches must be incorrect.

Second, in conducting this balancing, is the inquiry facial or as applied? In all cases except *Lane* and *Georgia*,

the inquiry was facial. Those last two cases, however, employed an as-applied mode of analysis. Is this mandatory, or was there something specific in the factual or procedural background of those cases that made them particularly appropriate for an as-applied inquiry?

Third, what criteria should be used to define and select the appropriate "class of cases" for purposes of the case-by-case analysis employed by the Court in *Lane* and *Georgia*? This case is a perfect example of this problem – the Court of Appeals concluded that the appropriate class included all levels of education, whereas the University argues that the appropriate class should be limited to higher education. Putting aside the question of which position is correct, the fact remains that this Court's precedents do not furnish easily-manageable criteria for lower courts and litigants to take into consideration in selecting the appropriate class.

Fourth, what type of evidence – and how much of it – will be deemed sufficient for Congress to conclude that there is a widespread pattern of constitutional violations? The answers provided by this Court in *Garrett* and *Lane*, are not entirely consistent. *Compare Lane*, 541 U.S. at 522-529, *with Garrett*, 531 U.S. at 369-372. Unfortunately, *Georgia* did not clarify the matter, because it was not necessary to reach the issue.

Fifth, can the unconstitutional conduct of non-State governments be taken into consideration in evaluating whether Congress had sufficient evidence to justify the decision to abrogate State sovereign immunity? In *Lane*, the Court answered this question in the affirmative, but did so in part because even local governments were considered arms of the state for purposes of the provision of

judicial services. 541 U.S. 527 n.16. The Court did not, however, expressly disavow earlier formulations in which such evidence was not considered pertinent. *See, e.g., Garrett*, 531 U.S. at 368-369.

C. The Decision Below Is Incorrect

The Court of Appeals correctly framed the question before it: "[b]ecause Toledo has stated a claim that the University violated Title II but not the Fourteenth Amendment, we must address whether Congress's abrogation of sovereign immunity as to that class of conduct is valid as a prophylactic measure within Congress's § 5 power." 454 F.3d at 34 (App. 12). Unfortunately, it reached the wrong result, and the source of the error was threefold.

1. The Applicable Class Of Cases Should Have Been Limited To Public University And Graduate Education, Instead Of All Public Education

The Court of Appeals made this critical decision on the basis of a mechanical application of what it understood *Lane* to stand for:

> In order to apply the *City of Boerne* test to the class of conduct at issue here, we must ascertain the level of generality at which to conduct our inquiry. The University contends that we should limit our decision to the validity of Title II as it applies to the conduct of public universities, while the United States contends that we should consider government conduct at all levels of public education. In *Lane*, the Court decided the validity of Title II as it applied to the class of cases implicating the "accessibility of judicial services,"

> including applications to criminal defendants, civil litigants, jurors, public spectators, the press, and witnesses. . . . A number of these statutory applications and the corresponding constitutional rights that they implicated were neither presented by the plaintiffs in *Lane* nor directly related to the facts of the case. The Supreme Court's broad treatment of judicial services suggests that we should consider Title II as it applies to public education in general. The *Lane* opinion covered an even more varied range of government conduct than the United States urges in this case, so we conclude that our analysis should be applied to public education generally.

454 F.3d at 36 (App. 15) (citation omitted). The above is the Court of Appeals' entire discussion of the subject.

Rhetorically and legally, this was a crucial move, because it allowed the Court of Appeals to draw support for its ultimate conclusion (that Title II's abrogation of State sovereign immunity is a congruent and proportional response to the evils identified by Congress) from the literature documenting the importance to children, regardless of disability, of primary and secondary education, as well as the shameful record of discrimination against disabled children at public primary and secondary schools around the nation. In contrast to this extensive record of discrimination at the K-12 level, however, there is almost no evidence of a similar problem having existed at the university level. Indeed, in the brief it submitted to the Court of Appeals, the United States was able to identify in the entire legislative history of the ADA only nine

individual anecdotes of possible disability discrimination at the university level.[4]

This disparity in terms of the evidence available to Congress should not come as a surprise, because there are key features that distinguish K-12 education from university education for purposes of the ADA. First and foremost, even if strictly speaking, there is no constitutional right to receive K-12 education, as a practical matter, it is often a statutory right, not to say an obligation. Indeed, State and local governments generally *require* school-age students to be in school. Thus, except for magnet and other specialized schools, public primary and secondary schools most emphatically do *not* have a merit-based admission process. Inside each school, students may be placed on different tracks, depending on their skills and interests, but it is almost unknown for public schools to turn anyone away because of grades.[5]

Higher education is different. As with primary and secondary education, there is no constitutional right to college and graduate education – but in addition, there is no comparable practice of creating a statutory right to college education. Merit (albeit as defined by each institution as befits its goals and philosophy) is supposed to be

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[4] All of these anecdotes are listed on one paragraph at pages 27-28 of the United States' Brief as Intervenor below. These appear to comprise the sum and substance of the evidence put before Congress of potential disability discrimination at the university level.

[5] In fact, the Individuals with Disabilities Education Act of 1975 (IDEA), 20 U.S.C.A. § 1400 *et seq.*, provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE) to disabled children, including those suffering from mental disabilities, generally regardless of their academic skills.

the guiding principle for admissions. Thus, public support for higher education generally comes through the endowment and administration of institutions of higher education, as well as through financial aid programs, and not through statutory mandates for open admissions.

Other differences between university and K-12 education have to do with developmental and policy considerations. For example, it is widely recognized that the critical years for the academic, social, and emotional development of children start in early childhood and last through adolescence – that is, from preschool through secondary school, not university. Moreover, as the United States noted in its brief below, from a policy standpoint, "discrimination in *public* schools is particularly harmful because '[p]ublic education must prepare pupils for citizenship in the Republic' and must teach 'the shared values of a civilized social order.'" Intervenor's Brief, at 31 (emphasis in original) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681, 683 (1986)). The University has no quarrel with these observations, but must point out that by its own terms, the "civics" model it refers to is characteristic of K-12 education – not of university education.

Finally, the practical effect of the Court of Appeals' decision in this case to consider evidence of disability discrimination in primary and secondary schools is to impute to State governments the conduct of local school boards – about which more below.

2. The Court Of Appeals Also Erred In Focusing Its "Congruence And Proportionality" Analysis On The Operative Provisions Of Title II Of The ADA, Instead Of On The Specific Prophylactic Remedy That The University Was Challenging: The Abrogation Of Its Sovereign Immunity From Suits For Damages

The Court of Appeals failed to follow *Florida Prepaid*, in which this Court focused its analysis, not on the operative provisions of the federal patent laws but, instead, on whether the specific remedy selected by Congress (in that case, as in this one, the statutory abrogation of State immunity) was reasonably tailored to remedy or prevent "conduct transgressing the Fourteenth Amendment's substantive provisions." 527 U.S. at 639.

The question of the propriety under § 5 of authorizing private suits for damages is entirely different from the question whether the substantive provisions of Title II should be applied to the States. There is no indication in the legislative history or in the First Circuit's opinion below that Congress ever analyzed with any care whether abrogating State sovereign immunity was reasonably tailored to remedy or prevent unconstitutional conduct. The omission is telling, because the remedial effect of an injunction is almost self-evidently greater than that of an award of damages. After all, the congruence and proportionality step of the *Boerne* test requires a species of balancing between the evil sought to be avoided and the measures adopted by Congress to avoid it. Therefore, even if this Court were to conclude that Congress does have the authority under § 5 to require, with respect to a given class of conduct, States to comply with Title II's substantive provisions (which are enforceable through private

suits for injunctive relief against State officers), it would not necessarily follow that Congress would *also* have the authority to abrogate the States' immunity.

This permits a more nuanced understanding of this Court's statement to the effect "our cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry." *Lane*, 541 U.S. at 527 n.16. In view of the need for a means-ends fit between the specific remedy selected by Congress and the harm it identified, one might not unreasonably argue that, for purposes of the availability of injunctive relief, it is relevant that Congress found that there was widespread discrimination against the disabled. But for purposes of abrogating Eleventh Amendment immunity, which means making State treasuries liable, it would seem that the conduct of other States (or, even more clearly, of non-state governments) should not matter, particularly when what is at issue is the possibility of economic liability without proof of a constitutional violation.

In evaluating the appropriateness of Congress's attempt to abrogate State sovereign immunity, it must be kept in mind that making State treasuries liable for violations of Title II is not *necessary* for most plaintiffs to obtain economic compensation for any harm they may have suffered as a result. To the contrary, given that Congress could authorize them to sue state officers in their individual capacity for damages, the abrogation of State sovereign immunity is merely a convenience, since it provides plaintiffs with a deeper pocket and thus avoids the risk of a guilty defendant turning out to be judgment-proof. Convenience alone does not justify a measure as drastic as abrogating the States' immunity.

3. The Court Of Appeals Erred In Concluding That Congress Was Empowered To Abrogate The States' Sovereign Immunity When The Underlying Claims Neither Constituted A Violation Of A Constitutional Right Nor Infringed An Interest Subject To Heightened Scrutiny

The University of Puerto Rico respectfully contends that this Court should answer the question presented by ruling that abrogation is not valid when State violations of Title II do not constitute independent violations of the Fourteenth Amendment or do not involve infringements of interests subject to heightened scrutiny. As noted above, this Court has *never* found that Congress has the power to abrogate State sovereign immunity in cases not involving conduct that independently constitutes a constitutional violation. The reason is that sovereign immunity is of independent constitutional value. Therefore, the issue here is not and cannot be simply a matter of determining whether or not Congress may or may not act pursuant to § 5 to remedy some perceived pattern of constitutional violations. The issue is whether the specific means employed are appropriate to that end. Where the means include a measure as drastic as the abrogation of a sovereign's immunity, the inquiry must be that much more searching and demanding.

In the case of Title II, it is evident that Congress did not conduct a searching inquiry as to whether abrogation of State sovereign immunity was an appropriate means of remedying and deterring the type of constitutional violations it was concerned about. At least with respect to Title II, therefore, this Court should rule that it can never suffice to abrogate a State's sovereign immunity unless the State's conduct constitutes, not only a violation of Title II,

but also of a substantive constitutional right. And given that Respondent failed to state a constitutional claim against the University, the judgment below should be reversed.

CONCLUSION

For the foregoing reasons, the instant petition for certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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App. 1

United States Court of Appeals
For the First Circuit

No. 05-1376

IVÁN TOLEDO,

Plaintiff-Appellee,

UNITED STATES,

Intervenor,

v.

JORGE L. SÁNCHEZ, Deputy President; GEORGE V. HILLYER, Chancellor; JOHN HERTZ, Dean; PEDRO PADILLA, Counselor; SONIA BAZÁN, Design Professor; NATHANIEL FUSTER, Design Professor/Design Committee Director; UNIVERSITY OF PUERTO RICO,

Defendants-Appellants.

UNIVERSITY OF PUERTO RICO, Río Piedras Campus; UNIVERSITY OF PUERTO RICO, Río Piedras Campus-Resource Office for the Disabled; LUDIM DÍAZ; UNIVERSITY OF PUERTO RICO, Río Piedras Campus, Legal Advisor's Office; LUIS M. VÁZQUEZ, Director; MARÍA LUGO, Legal Advisor; UNIVERSITY OF PUERTO RICO, Río Piedras Campus – School of Architecture; MANUEL GARCÍA; LIZETTE COLÓN, Student Affairs Administrator,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Salvador Casellas, U.S. District Judge]

Before

Torruella, Circuit Judge,
John R. Gibson, Senior Circuit Judge*
and Howard, Circuit Judge.

Julio Nigaglioni Arrache, for Appellants.

Víctor P. Miranda-Corrada, for Appellee.

Sarah E. Harrington, Department of Justice, Civil Rights Division, with whom Bradley J. Schlozman and Jessica Dunsay Silver were on brief, for the United States as Intervenor.

Jennifer Mathis, Bazelon Center for Mental Health Law, with whom Debra Gardner, Roscoe Jones, Jr., and Suzanne Sangree, Public Justice Center, were on brief, for AARP, Bazelon Center, Public Justice Center, and 23 other organizations representing people with disabilities, as Amici Curiae in support of appellee.

July 6, 2006

JOHN R. GIBSON, Circuit Judge. This appeal raises the question of whether the Eleventh Amendment prevents a disabled student from suing a state university for damages under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131-12165. Iván

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* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Toledo, a student at the University of Puerto Rico who has schizoaffective disorder, brought an action under Title II of the ADA alleging that the University and various University officials discriminated against him on the basis of his disability and failed to reasonably accommodate his disability. The University moved to dismiss the Title II claims under Fed.R.Civ.P. 12(b)(6) and the Eleventh Amendment. The district court granted the motion on Eleventh Amendment immunity grounds, but later reinstated the claims in the wake of the Supreme Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004). The University filed an interlocutory appeal to this court. We have jurisdiction under *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and we affirm.

I.

Because this case is at the motion to dismiss stage, we accept as true the facts alleged in the complaint and draw all reasonable inferences in Toledo's favor. *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 62 (1st Cir. 2004); *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 25 (1st Cir. 1999). Toledo began his studies at the University of Puerto Rico School of Architecture in the fall of 1999, but during the first semester his mental condition deteriorated, causing him to experience anxiety, panic, and depression. Because of his condition and the required treatment, he was unable to attend classes regularly for part of the semester. When Toledo returned to a regular schedule, one of his professors refused to accommodate his situation; because of the professor's refusal to make any accommodation, Toledo turned in an incomplete assignment which the

professor ridiculed in front of the class. Toledo continued to request accommodation from the professor and school administrators. However, these requests were denied and he completed the semester with a grade of D in the course.

During the summer after his first year, Toledo suffered an emotional crisis, attempted suicide, and was hospitalized for some time. He was absent from school during the fall semester of his second year for another hospital stay. When he returned to classes, the school still refused to provide accommodation. Toledo often arrived up to 45 minutes late to class because of side effects from his medication, and despite presenting medical certificates and explaining his situation, his design professor treated him differently from other students who arrived late. The professor also refused to grant him any additional time to complete his work, causing Toledo to receive a failing grade in the class. Later, the dean reprimanded him for complaining about this professor on an evaluation form. Toledo had difficulty registering for classes the following semester due to his poor academic standing. When the University refused to allow him to take courses at another university to preserve his standing, Toledo dropped out of school entirely.

After filing an administrative complaint with the United States Department of Justice, Toledo filed a pro se complaint in the United States District Court of Puerto Rico asserting claims under 42 U.S.C. § 1983; the Rehabilitation Act of 1973, 29 U.S.C. § 794; the ADA, 42 U.S.C. § 12101 et seq.; and the Constitution of the United States, among other claims. The University and University officials, who were sued in their official capacity, moved to dismiss the Title II claims under Fed.R.Civ.P. 12(b)(6) and on Eleventh Amendment immunity grounds. The district

court initially granted this motion, but reinstated the claims upon Toledo's motion after the Supreme Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004). The University filed a motion for reconsideration under Rule 59(e), which was denied, and then filed this interlocutory appeal.

II.

Congress enacted Title II of the ADA to combat discrimination by governmental entities in the operation of public services, programs, and activities. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The statute authorizes private suits against public entities to enforce its provisions. *See* 42 U.S.C. § 12133 (incorporating by reference 29 U.S.C. § 794a).

The Eleventh Amendment guarantees that private individuals may not sue nonconsenting states[1] in federal court. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). Nevertheless, Congress can abrogate this immunity so long as it makes "its intention to abrogate

[1] We have held on numerous occasions that Puerto Rico is a state for Eleventh Amendment immunity purposes. *See, e.g., De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991); *Ramírez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983) ("Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects."). The University of Puerto Rico is considered an arm of the state within the purview of the Eleventh Amendment. *Pinto v. Univ. of P.R.*, 895 F.2d 18, 18 (1st Cir. 1990).

unmistakably clear in the language of the statute" and acts "pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003). With respect to Title II, Congress has met the first requirement of unequivocally expressing its intent to abrogate state sovereign immunity. *See Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (citing 42 U.S.C. § 12202). As to the second requirement, the Supreme Court has held that Title II of the ADA validly abrogates sovereign immunity as to (1) state conduct that actually violates the Constitution, *United States v. Georgia*, 126 S.Ct. 877, 882 (2006), and (2) some classes of state conduct that do not facially violate the Constitution but are prohibited by Title II in order to "prevent and deter unconstitutional conduct." *Lane*, 541 U.S. at 518, 529. Thus, in order to decide whether Toledo can sue the University for damages we must determine "on a claim-by-claim basis, (1) which aspects of the state's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*, 126 S.Ct. at 882.

III.

Pursuant to the Supreme Court's direction in *United States v. Georgia*, we first must ascertain if any aspect of the University's alleged conduct states a claim for a violation of Title II.[2] To state a claim for a violation of Title

[2] The United States, intervenor in this case, submitted a supplemental letter brief after the Supreme Court's decision in *Georgia* urging

(Continued on following page)

II, a plaintiff must allege: (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits or discrimination was by reason of his disability. *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 4 (1st Cir. 2000); 42 U.S.C. § 12132. Title II imposes an affirmative obligation on public entities to make their programs accessible to qualified individuals with disabilities, except where compliance would result in a fundamental alteration of services or impose an undue burden. *Parker*, 225 F.3d at 5 (citing 28 C.F.R. § 35.150).

Toledo's Third Amended Complaint alleges that the University violated Title II of the ADA both by discriminating against him based on his disability and by failing to provide him with reasonable accommodation.[3] Toledo properly alleges that he is a qualified individual with a disability as he alleges that he has a mental impairment, schizoaffective disorder, that substantially limits the

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us to remand the case to the district court for the determination of whether Toledo validly alleged violations of Title II and whether those claims would independently state constitutional violations. However, as this analysis simply requires a legal determination under the standard set out in Fed.R.Civ.P. 12(b)(6), and because a remand would further prolong the lengthy course of this litigation, we will address these questions.

[3] Toledo's Third Amended Complaint also claims that the University retaliated against him for demanding his rights under the ADA, which would violate Title V of the ADA, 42 U.S.C. § 12203. The district court did not evaluate this claim in the motion to dismiss below and this interlocutory appeal only concerns the reinstatement of Toledo's Title II claims. Accordingly, we do not address whether Title V of the ADA validly abrogates state sovereign immunity.

major life activity of learning, and that save for his disability he was qualified to participate in the architecture program at the University. *See* 42 U.S.C. § 12131; 28 C.F.R. § 35.104. He also sufficiently alleges that the University, a public entity governed by the ADA, engaged in conduct that violated Title II. Toledo claims that he failed his design course as a result of "discriminatory animus" on the part of his professor and the dean, and that his design professor ignored him when he arrived late to class unlike other tardy students without disabilities. Toledo also avers that he was unable to fulfill the requirements of his courses because of his disability and that his professors, his advisor, and the dean all refused to provide reasonable accommodation so that he could complete his course work and register for classes. For example, he states that his design professor suggested that he abandon his prescription medication because it was preventing him from arriving on time to class and advised him that she would not grant him exceptions or any additional time to complete his work.

The University may ultimately be able to negate the charges of discrimination or show that the two instances of "discrimination" in fact were simply the application of neutral criteria that applied to disabled and nondisabled students alike. *See, e.g., Baird ex rel. Baird v. Rose*, 192 F.3d 462, 467-68 (4th Cir. 1999). The University may also be able to show that it considered Toledo's accommodation requests but determined as a matter of professional, academic judgment that such requests were not reasonable because they would lower academic standards or substantially alter the degree program. *See Darian v. Univ. of Mass. Boston*, 980 F.Supp. 77, 88-89 (D.Mass. 1997). However, at this stage in the litigation, Toledo's

complaint sufficiently alleges state conduct that violated Title II of the ADA.

IV.

The next step under *United States v. Georgia* is to evaluate whether any of the University's conduct that violated Title II independently states a violation of the Fourteenth Amendment. 126 S.Ct. at 882. There are two potential sources of constitutional rights in the context of discrimination or a failure to accommodate a disability in public education: the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.

The Due Process Clause guarantees some notice and an opportunity to be heard before a student can be suspended or expelled from school. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). These rights are implicated when a student's future attendance at a public institution of higher education is in jeopardy. *See Gorman v. Univ. of R.I.*, 837 F.2d 7 (1st Cir. 1988). However, because Toledo voluntarily left the architecture program at the University, his Title II claims raise no due process concerns.

The Equal Protection Clause requires states to treat alike all persons similarly situated. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). To assess whether the University's conduct violated this guarantee, we must determine the appropriate level of scrutiny to be applied to Toledo's claims. Unless state action burdens a suspect class or impinges upon a fundamental right, we review equal protection claims for a rational relationship between the disparity of treatment and a legitimate government purpose. *Heller v. Doe*, 509 U.S. 312, 319 (1993).

The disabled are not a suspect class for equal protection purposes. *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 448-50 (1985). In addition, public education is not a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). However, neither is education "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler*, 457 U.S. at 221. The Supreme Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting *Plyler*, 457 U.S. at 221); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). Therefore, the Supreme Court struck down under heightened scrutiny the exclusion of a discrete group of children from a free public education offered to other resident children as violative of equal protection. *Plyler*, 457 U.S. at 230.

Nonetheless, aside from outright exclusion, the Supreme Court continues to employ rational basis review for classifications that burden the educational opportunities of a non-suspect class. *See Kadrmas v. Dickinson Public Sch.*, 487 U.S. 450, 459 (1988). Therefore, states may treat disabled students differently or refuse to make special accommodations for the disabled so long as the states' actions are rationally related to some legitimate governmental purpose. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-68 (2001). States may not, however, treat disabled students differently solely out of "irrational prejudice." *Cleburne*, 473 U.S. at 450.

With respect to Toledo's claims that the University failed to accommodate his disability, he must allege that these decisions were irrational and not motivated by any conceivable legitimate reason. *See Garrett*, 531 U.S. at 367-68; *Heller*, 509 U.S. at 320. Even reading Toledo's complaint generously, he has failed to allege that the University's failure to accommodate his situation was due to irrational prejudice and, indeed, rational bases for the actions are apparent from the face of the complaint. Toledo alleges that the University failed to accommodate his disability in the following ways: his design professor refused to allow him to regularly arrive late to class and made class participation a substantial part of the grading scheme, two professors would not extend deadlines for written work, and the University declined to open an afternoon section of a required course when Toledo informed the Dean that he was unable to attend morning sessions due to his medication. All of these actions are rationally related to the University's academic mission and budgetary constraints and thus do not rise to the level of constitutional violations. *See Heller*, 509 U.S. at 320.

Toledo also contends that the University actively discriminated against him on the basis of his disability, rather than merely failing to make accommodation. Toledo claims that the Dean and his professor gave him a failing grade in his design class because of their "discriminatory animus" and that his design professor treated him differently from other students who arrived late to class. Although there is no heightened pleading standard for civil rights claims, mere conclusory allegations of discrimination unsupported by any facts are insufficient for notice pleading purposes. *See Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 68 (1st Cir. 2004). In

order to state a claim for discrimination that violates equal protection, Toledo must allege that he was intentionally treated differently from others similarly situated and there was no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). However, Toledo admits in his complaint that he was repeatedly 45 minutes late to his design class, absent for several weeks due to a hospital stay, and that many of his assignments were late or incomplete. He does not allege that any other students who had similar records received better than a failing grade. Nor does he allege that any other late-arriving students had the same record of repeated tardiness. *See Aponte-Torres v. Univ. of P.R.*, 445 F.3d 50, 56-57 (1st Cir. 2006). Toledo has therefore failed to allege state conduct that independently states a claim for a violation of the Equal Protection Clause.

V.

Because Toledo has stated a claim that the University violated Title II but not the Fourteenth Amendment, we must address whether Congress's abrogation of sovereign immunity as to that class of conduct is valid as a prophylactic measure within Congress's § 5 power. *United States v. Georgia*, 126 S.Ct. 877, 882 (2006). "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *City of Boerne v. P.F. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)); *see also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding

Family and Medical Leave Act as valid prophylactic legislation designed to combat unconstitutional sex discrimination although the state's leave policy itself was constitutional).

To determine whether prophylactic legislation under § 5 is valid, a court must consider: (1) the constitutional right or rights that Congress sought to protect when it enacted the statute; (2) whether there was a history of constitutional violations to support Congress's determination that prophylactic legislation was necessary; and (3) whether the statute is a congruent and proportional response to the history and pattern of constitutional violations. *See Tennessee v. Lane*, 541 U.S. 509, 522-31 (2004) (describing the elements of the test first established by the Supreme Court in *City of Boerne*, 521 U.S. at 529-36).

In applying the first two steps of the *City of Boerne* test, the Court in *Lane* discussed the range of constitutional guarantees implicated by Title II and the history of constitutional violations in all areas of public services, including health care, zoning, marriage, jury service, the penal system, public education, and voting. *Id.* at 522-26. The Court concluded that the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," made it "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *Id.* at 528-29. Then, at the third step of the analysis, the Court chose to focus on the congruence and proportionality of Title II as applied only to judicial services, declining to consider Title II as an "undifferentiated whole." *Id.* at 530.

Some appellate courts have chosen to interpret this approach in *Lane* as conclusively establishing that Title II survives the first two steps of the *City of Boerne* inquiry, leaving only the congruence and proportionality of Title II at issue for future cases that concern other areas of government conduct. *See, e.g., Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 487 (4th Cir. 2005); *Cochran v. Pinchak*, 401 F.3d 184, 191 (3d Cir.), *vacated pending decision in United States v. Georgia*, 412 F.3d 500 (3d Cir. 2005); *Ass'n for Disabled Americans, Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005). Indeed, we stated in *Badillo-Santiago, M.D. v. Naveira-Merly*, 378 F.3d 1, 5-6 (1st Cir. 2004), that the *Lane* opinion establishes that Title II as a whole satisfies the first two steps of *City of Boerne*. However, that case was brought by a litigant who claimed that a state court had failed to accommodate his hearing impairment, and so our decision involved a direct application of the access to the courts holding of *Lane*. Therefore, our statement was only dictum for purposes of Title II's application to other areas of government conduct.

We believe the sounder approach is to focus the entire *City of Boerne* test on the particular category of state conduct at issue. As recognized by the Court in *Lane*, Title II "reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees," applying "not only to public education and voting booth access but also to seating at state-owned hockey rinks." 541 U.S. at 530. The history of discrimination and the need for prophylaxis will vary greatly in these different contexts. It is necessary to understand the specific constitutional rights and the history of constitutional violations in the particular area at issue in order to

determine the congruence and proportionality of Title II's measures in that area. While the *Lane* opinion does speak broadly about Title II in its discussion of the first two steps of the *City of Boerne* inquiry, the opinion separately addresses the particular rights at stake and the record of constitutional violations in the context of judicial services and later draws on that discussion in buttressing its argument that Title II is congruent and proportional legislation as applied to judicial services. *See Lane*, 541 U.S. at 523, 527, 531-32.

In order to apply the *City of Boerne* test to the class of conduct at issue here, we must ascertain the level of generality at which to conduct our inquiry. The University contends that we should limit our decision to the validity of Title II as it applies to the conduct of public universities, while the United States contends that we should consider government conduct at all levels of public education. In *Lane*, the Court decided the validity of Title II as it applied to the class of cases implicating the "accessibility of judicial services," including applications to criminal defendants, civil litigants, jurors, public spectators, the press, and witnesses. 514 U.S. at 531, 522-23. A number of these statutory applications and the corresponding constitutional rights that they implicated were neither presented by the plaintiffs in *Lane* nor directly related to the facts of the case. The Supreme Court's broad treatment of judicial services suggests that we should consider Title II as it applies to public education in general. The *Lane* opinion covered an even more varied range of government conduct than the United States urges in this case, so we conclude that our analysis should be applied to public education generally.

A.

The first step of the *City of Boerne* analysis is identifying the constitutional rights that Congress sought to protect by enacting Title II and applying it to public educational institutions. *Lane*, 541 U.S. at 522. The Supreme Court's Equal Protection Clause and Due Process Clause jurisprudence places a special emphasis on the constitutional rights implicated by discrimination in public education, and Title II seeks to enforce those rights by prohibiting discrimination against the disabled and providing for accommodations of their special needs.

The Supreme Court has recognized the vital importance of all levels of public education in preparing students for work and citizenship as well as the unique harm that occurs when some students are denied that opportunity. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education"); *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) ("[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals"). The Court's decisions under the Equal Protection Clause suggest that states cannot categorically deny disabled students access to public education. *See Plyler v. Doe*, 457 U.S. 202, 221-22 (1982) (striking down on equal protection grounds the complete exclusion of the children of illegal aliens from public schools and noting that "the benefits of education are not reserved to those whose productive utilization of them is a certainty"); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982) (describing the Education for All Handicapped Children Act, which requires states to assure disabled students access to public education, as providing "a 'basic

floor of opportunity' consistent with equal protection"). In addition, the Due Process Clause protects against the arbitrary exclusion of disabled students from public educational institutions, in light of the property and liberty interest in receiving a public education. *See Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954); *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (student's interest in pursuing a higher education is included within the Fourteenth Amendment's protection of liberty and property). Finally, with respect to the disabled students already attending public schools and universities, the Equal Protection Clause prohibits "irrational disability discrimination," therefore forbidding states from relying on irrational fears and prejudice to discriminate against disabled students or to deny them reasonable accommodation. *Lane*, 541 U.S. at 522; *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

B.

Having identified the constitutional rights implicated by the states' treatment of the disabled in the area of public education, we next consider whether there is a history of a violation of those rights by the states. *Lane*, 541 U.S. at 523. Moreover, we evaluate how grave and how widespread the constitutional violations were in order to judge the appropriateness of prophylactic legislation. *See Hibbs*, 538 U.S. at 729. We rely on the types of sources that the Supreme Court approved of in *Lane*: state statutes,

court decisions, and examples from the legislative history of the ADA.[4]

Historically, children with mental disabilities were labeled "ineducable" and were categorically excluded from public schools to "protect nonretarded children from them." *Cleburne*, 473 U.S. at 463 (Marshall, J., concurring). Congress first addressed the education of the disabled in 1966, when it amended the Elementary and Secondary Education Act of 1965 to provide grants for states to initiate and improve programs for the education of handicapped children. Pub.L. 89-750 § 161. Yet by statute, a number of states continued to exclude children with disabilities from public education entirely. *See, e.g.*, Ala.Code § 21-1-10 (1975); Del. Const. art. X, § 1 (1975); Neb.Rev.Stat. § 79-202 (1971); N.C. Gen.Stat. § 115-165 (1966); Nev.Rev.Stat. § 392.050 (1967); Tex.Code Ann. § 3260 (1990).

Numerous lower court decisions demonstrate that the states were violating the Due Process and Equal Protection rights of disabled children by completely denying them educational opportunities. *See, e.g., Pa. Ass'n for Retarded Children v. Commonwealth*, 343 F.Supp. 279, 293, 297 (E.D.Pa. 1972) (finding the state's treatment of mentally retarded children "crass and summary" and expressing "serious doubts" about any rational basis for the state's exclusion of approximately 75,000 mentally retarded children from any public education services);

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[4] The Court recognized that many of the examples of constitutional violations concerned the conduct of non-state governments. Nevertheless, the Court stated that "our cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry." 541 U.S. at 527 n. 16.

Mills v. Bd. of Ed. of D.C., 348 F.Supp. 866, 876 (D.D.C. 1972) (holding that District of Columbia violated due process by denying handicapped students a publicly supported education and suspending or expelling such children from regular schooling or special instruction without a hearing); *Harrison v. Michigan*, 350 F.Supp. 846, 847 (E.D.Mich. 1972) (noting that the state's denial of an education to handicapped children until 1971 raised serious equal protection issues); *Fialkowski v. Shapp*, 405 F.Supp. 946, 958 (E.D.Pa. 1975) (mentally retarded children who were completely denied an educational opportunity had stated a valid equal protection claim).

Congressional studies in the early 1970s revealed that of the roughly eight million handicapped children in the United States, one million were "excluded entirely from the public school system" and more than half were not receiving appropriate educational services. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 (1982) (citing 89 Stat. 774, note following § 1401). Congress found that the disabled children who were not excluded from public education were "simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Honig v. Doe*, 484 U.S. 305, 309-11 (1988) (citing H.R. Rep. No. 94-332, p. 2 (1975)).

In response, in 1973 Congress enacted the Rehabilitation Act, 29 U.S.C. § 794, which forbids any program receiving federal aid from discriminating against an individual by reason of a handicap. And in 1975 Congress went even further by enacting the Education for All Handicapped Children Act, later renamed the Individuals with Disabilities Education Act, which requires states receiving federal funding for education to assure all

handicapped children the right to a "free appropriate public education." 20 U.S.C. § 1412(1). The Supreme Court characterized this latter legislation as intending to "aid the States in complying with their constitutional obligations to provide public education for handicapped children." *Smith v. Robinson*, 468 U.S. 992, 1009 (1984).

Even after this early federal legislation, states continued to violate the constitutional rights of disabled students. *See, e.g., Hairston v. Drosick*, 423 F.Supp. 180, 184 (S.D.W.Va. 1976) (public school violated Due Process Clause by excluding a student with spina bifida from regular public classroom without procedural safeguards); *Cuyahoga County Ass'n for Retarded Children & Adults v. Essex*, 411 F.Supp. 46, 58-59 (N.D. Ohio 1976) (finding Ohio regulations governing the placement and dismissal of mentally retarded children violated due process); *Panitch v. Wisconsin*, 444 F.Supp. 320, 322 (E.D.Wis. 1977) (holding that Wisconsin violated equal protection rights of handicapped children by denying them an education at public expense); *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 466 F.Supp. 487, 504 (E.D.N.Y. 1979) (segregation of mentally retarded students with hepatitis B found to be without rational basis). In addition, a number of cases brought under the Rehabilitation Act and the Education of All Handicapped Children Act discuss the persistent negative attitudes and irrational public fears that led to the exclusion of students with AIDS (who qualify as "handicapped") from public schools, despite the lack of evidence of AIDS transmission in school settings. *See, e.g., Thomas v. Atascadero Unified Sch. Dist.*, 662 F.Supp. 376 (C.D.Cal. 1986); *Robertson v. Granite City Cmty. Unit Sch. Dist. No. 9*, 684 F.Supp. 1002 (S.D.Ill.

1988); *Doe v. Dolton Elem. Sch. Dist. No. 148*, 694 F.Supp. 400 (N.D.Ill. 1988).

A report before Congress in 1983 indicated that tens of thousands of disabled children continued to be excluded from public schools or placed in inappropriate programs. U.S. Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* 28-29 (1983). Testimony before the House Committee on Education and Labor and the Senate Subcommittee on Disability Policy included statements by numerous disabled individuals who had been excluded from participation or faced irrational prejudice at all levels of public education. *See generally*, Staff of House Comm. on Education and Labor, 101st Cong., *Legislative History of Pub.L. No. 101-336: The Americans with Disabilities Act* (Comm. Print 1990).

In sum, the thirty years preceding the enactment of the ADA evidence a widespread pattern of states unconstitutionally excluding disabled children from public education and irrationally discriminating against disabled students within schools. Faced with this record of persistent unconstitutional state action, coupled with the inability of earlier federal legislation to solve this "difficult and intractable problem," Congress was justified in enacting prophylactic § 5 legislation in response. *See Hibbs*, 538 U.S. at 735, 737.

C.

The remaining question is whether the provisions of Title II, as applied to public educational institutions, are a congruent and proportional response to this history and pattern of unconstitutional discrimination. *Lane*, 541 U.S. at 530. We must determine whether the application of

Title II to public educational institutions is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532.

Title II provides that otherwise qualified disabled students may not be excluded from educational programs or activities or otherwise discriminated against because of their disabilities. 42 U.S.C. § 12132. Schools and universities must make "reasonable modifications to rules, policies, or practices" to ensure that disabled students are able to participate in the educational program. In addition, they must remove "architectural, communication, or transportation barriers" and provide "auxiliary aids and services." *Lane*, 541 U.S. at 531-32 (discussing implication of 42 U.S.C. § 12131(2)).

By requiring states to make special accommodations for the disabled, Title II does impose a greater burden on states than the Fourteenth Amendment itself. *Garrett*, 531 U.S. at 367. Nonetheless, Title II protects against the categorical exclusion and discrimination born of irrational fears that characterized past state action with respect to disabled students. Title II directs states to make reasonable changes to their programs so that otherwise qualified disabled students can participate in public education. In addition, Title II addresses the fact that physical barriers historically perpetuated the exclusion of disabled students. *See Garrett*, 531 U.S. at 391 (App. C. to opinion of Breyer, J., dissenting) (collecting dozens of reports of the inaccessible facilities and programs at public schools and state universities) (cited in *Lane*, 541 U.S. at 526).

Title II's implementing regulations and the case law interpreting the Act demonstrate that the obligations imposed by Title II are limited in several ways that minimize the compliance costs imposed on states. States need not make structural changes to existing physical facilities if other methods can make the program or service accessible. 28 C.F.R. § 35.150(b) (2006). Furthermore, Title II requires only "reasonable modifications" to programs and facilities and "in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service." *Lane* at 532 (citing 28 C.F.R. §§ 35.150(a)(2), (a)(3) (2003)); 28 C.F.R. § 35.130(b)(7). A state may take into account its limited resources as well as the needs of other students with disabilities in determining what sorts of reasonable modifications are appropriate under Title II. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 604, 607 (1999). Finally, the ADA does not require public schools and universities to accommodate disabled students if the accommodation would substantially alter their programs or lower academic standards, and courts give due deference to the judgment of education officials on these matters. *See Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 152-53 (1st Cir. 1998); *Darian v. Univ. of Mass. Boston*, 980 F.Supp. 77, 88-89 (D.Mass. 1997).

The other appellate courts that have considered whether Title II validly abrogates state sovereign immunity in the context of public education have concluded that it satisfies the *City of Boerne* inquiry. *See Ass'n for Disabled Americans v. Fla. Int'l Univ.*, 405 F.3d 954, 959 (11th Cir. 2005); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005). As the

Eleventh Circuit emphasized in reaching its holding, "Discrimination against disabled students in education affects disabled persons' future ability to exercise and participate in the most basic rights and responsibilities of citizenship, such as voting and participation in public programs and services." *Ass'n for Disabled Americans*, 405 F.3d at 959.

We are similarly persuaded that Title II's prophylactic measures are justified by the persistent pattern of exclusion and irrational treatment of disabled students in public education, coupled with the gravity of the harm worked by such discrimination. Title II's provisions are consonant with the recognition in *Plyler v. Doe* that, without an education, individuals are deprived of "the ability to live within the structure of our civil institutions" and therefore foreclosed from "any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." 457 U.S. at 223. Title II creates an affirmative obligation for states to "reasonably modify" their programs so as to accommodate the "otherwise qualified" disabled students of this nation. This obligation is not disproportionate to the need to protect against the outright exclusion and irrational disability discrimination that such students experienced in the recent past.

VI.

For the above reasons, we conclude that Title II, as it applies to the class of cases implicating the right of access to public education, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment. Accordingly, state sovereign immunity is not a defense to this action, and we affirm the district

court's decision to reinstate Toledo's Title II claims. Without a doubt, the district court will face further issues in evaluating Toledo's claim for relief, but as the University is not entitled to sovereign immunity, those issues must be addressed in further proceedings.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

IVAN TOLEDO	*	
Plaintiff	*	
v.	*	
UNIVERSITY OF PUERTO RICO, et al.	*	**Civil No. 01-1980(SEC)**
Defendants	*	
* *	*	

OPINION AND ORDER

(Filed Jan. 14, 2005)

Before the Court are two motions for reconsideration filed by Plaintiff. In the first motion, Plaintiff seeks reconsideration of this Court's Opinion and Order dismissing the case in its entirety since there are certain causes of action left pending before the Court (Docket # 85). In the second motion, Plaintiff seeks reconsideration of this Court's Opinion and Order dismissing the cause of action under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a), *et seq.* (Docket # 94). Plaintiff premises his second request for reconsideration on new case law that has since established that Title II of the ADA validly abrogated states' Eleventh Amendment immunity. Defendants have only opposed Plaintiff's second motion for reconsideration (Docket # 95). After reviewing our previous orders, the case record, and the applicable law, for the reasons set herein, Plaintiff's first motion for reconsideration will be **GRANTED in part** and Plaintiff's second motion for reconsideration will be **GRANTED**.

Procedural Background

On August 26, 2002 the Court issued an Opinion and Order in the above-captioned case dismissing Plaintiff's claims against all Defendants in their official and individual capacities under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* and all claims against the Commonwealth of Puerto Rico and all Defendants in their official capacity under 42 U.S.C. § 1983 based on the Eleventh Amendment immunity defense (Docket # 30). In said opinion, the Court also held in abeyance Plaintiff's claims against all Defendants under Title II of the ADA. Then, the Court instructed both parties to brief the issue of whether the Title II of the ADA validly abrogated states' Eleventh Amendment immunity. After reviewing both parties' briefs, on September 9, 2003, the Court issued another opinion in which it granted Defendants' request for dismissal holding that, absent case law indicating that Title II of the ADA validly abrogated the Eleventh Amendment immunity, it would not reconsider its previous holding in *Badillo-Santiago v. Andreu-García*, 167 F.Supp.2d 194 (D.P.R. 2001) (Docket # 81). Thereafter, on September 19, 2003, Plaintiff filed his first motion for reconsideration claiming that this Court's opinion and subsequent judgment dismissing the case in its entirety should be amended since there were certain claims still pending, to wit, Section 1983 claims against Defendants in their individual capacity, claims under the Rehabilitation Act, and supplemental law claims for violations to Puerto Rico's Anti Disability Discrimination Act, 1 P.R. Laws Ann. § 508, and Article 1802 of the Civil Code of Puerto Rico, 31 P.R. Laws Ann. §5141 (Docket # 85). Before the Court could issue a decision on said motion, on May 20, 2004, Plaintiff filed a second motion for reconsideration, this

time alleging that new case law – the U.S. Supreme Court's decision in *Tennessee v. Lane*, 124 S.Ct 1978 (2004) – held that Title II of the ADA validly abrogated state immunity under the Eleventh Amendment (Docket # 94). Defendants' opposition argued that the Court's February 12, 2004 order (Docket # 92), "effectively decided any pending issues and or motions in this case" and that as such, this case has been closed for some time, thus warranting the denial of Plaintiff's second motion for reconsideration (Docket # 95).

Standard of Review

Plaintiff does not specify under which of the Federal Rules of Civil Procedure he files his first motion for reconsideration (Docket # 85). Because said motion was filed within ten (10) days after the entry of judgment, and because of the arguments therein, we will consider it filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Under Fed. R. Civ. P. 59(e), a party may ask the court "to amend its judgment based on newly discovered material evidence or because the Court committed a manifest error of law or fact." *Colón v. Fraticelli*, 181 F. Supp. 2d 48, 50 (D.P.R. 2002) *(citing Aybar v. Crispin-Reyes*, 118 F.3d 10, 16 (1st Cir. 1997). As such, Rule 59(e) "is aimed at reconsideration, [and] not initial consideration, and thus is not a proper mechanism to advance arguments that should have been presented before judgment was entered, but were not." *Berríos-Berríos v. Puerto Rico*, 205 F. Supp. 2d 1, 2 (D.P.R. 2002) (*citing Jorge Rivera-Surillo & Co., Inc. v. Falconer Glass Indus., Inc.*, 37 F.3d 25, 29 (1st Cir. 1994) *(citing F.D.I.C. v. World Univ., Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (internal quotations omitted)). Furthermore, "a motion for reconsideration may

not be used by [a] losing party . . . to repeat old arguments previously considered and rejected by the Court." *Id.* (*citing Standard Química de Venezuela, C.A. v. Cent. Hispano Int'l, Inc.*, 189 F.R.D. 202, 205 (D.P.R. 1999) (*citing Nat'l Metal Finishing Com. v. BarclaysAm./Commercial, Inc.*, 899 F.2d 119, 124 (1st Cir. 1990) (internal quotations omitted)).

Next, Plaintiff also fails to specify under which of the Federal Rules of Civil Procedure he files his second motion for reconsideration (Docket # 94). However, since said motion was filed almost eight (8) months after the entry of judgment, and because of the arguments therein, we will consider it filed under Rule 60(b)(5) of the Federal Rules of Civil Procedure. Pursuant to Rule 60(b)(5) the Court may relieve a party from final judgment when "a prior judgment upon which [a decision] is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). This rule further provides that said motion should be filed within "reasonable time." *Id.* "What constitutes reasonable time must of necessity depend upon the facts in each individual case." Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d § 2866 at 382. The decision to amend said judgment is highly discretionary. *Chang v. Smith*, 103 F.R.D. 401, 405 (affirming that "it is widely recognized that a motion for relief from judgment pursuant to Rule 60(b) is addressed to the sound discretion of the Court"). Ultimately, the Court should decide whether it is "no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). We will now proceed to analyze both of Plaintiff's requests for reconsideration separately.

Applicable Law and Analysis

1. First Motion for Reconsideration (Docket # 85)

In assessing whether a reconsideration of our order dismissing the case in its entirety is warranted, we look at the causes of action asserted in the Amended Complaint (Docket # 4). The Court notes that the Amended Complaint is a forty-eight (48) page long and convoluted document by which it is virtually impossible for the Court to ascertain the causes of action that may remain pending (Docket # 4). This Court's previous orders disposed of: (i) Plaintiff's claims against all Defendants in their official and individual capacities under Title VII of the Civil Rights Act; (ii) all claims against the Commonwealth of Puerto Rico and all Defendants in their official capacity under 42 U.S.C. § 1983; and (iii) claims against all Defendants under Title II of the ADA (Dockets ## 30 & 81). Given the length, stated facts, and organization of said Amended Complaint, the Court is not surprised that it **might have** mistakenly closed the case while there were certain causes of action pending. Therefore, out of an abundance of caution and pursuant to Rule 59(e), the Court hereby **GRANTS in part** Plaintiff's first motion for reconsideration and amends the September 9, 2003 Judgment to be a Partial Judgment. However, Plaintiff is hereby **ORDERED** to file an informative motion by **February 4, 2005** specifying the causes of action that remain pending and the exact place in the Amended Complaint in which these causes of action were first asserted.

2. Plaintiff's Second Motion for Reconsideration (Docket # 94)

Relief from judgment may be granted pursuant to Rule 60(b)(5) if the Court finds that its determination was based on a prior decision which has been reversed, vacated, or is no longer good law. *See* Fed. R. Civ. P. 60(b)(5). "For a decision to be 'based on' a prior judgment within the meaning of Rule 60(b)(5), the prior judgment must be a necessary element of the decision, giving rise, for example, to the cause of action or a successful defense." *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 650 (1st Cir. 1972). It is not enough that the law was merely applied by the Court or that the prior judgment was relied on as precedent for the decision. *Id. (citing* 7 Moore's Federal Practice ¶ 60.26[3] at 325); *see e.g., Coalition of Black Leadership v. Cianci*, 570 F.2d 12, 16 (1st Cir. 1978). As such, there must be "a fundamental change in the legal predicates" used by the Court in issuing the original decision. *Theriault v. Smith*, 523 F.2d 601, 602 (1st Cir. 1975) (holding that a defendant who sought prospective relief as a result of an important contradictory Supreme Court decision is entitled to relief pursuant to Rule 60(b)(5)).

In its Opinion and Order issued on August 26, 2002, the Court specifically granted the parties time to brief the issue of whether its precedent in *Badillo-Santiago*, 167 F.Supp.2d 194 was no longer controlling in the decision of whether Title II of the ADA effectively abrogated the states' Eleventh Amendment immunity (Docket # 30). Then, after receiving briefs, the Court decided that since the First Circuit Court decision in *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13 (1st Cir. 2002) was withdrawn and granted a rehearing *en banc*,

"we find no reason why we should not follow our own precedent set in *Badillo Santiago*." (Docket # 8). Evidently, said opinion was issued before this Court had the benefit of the subsequent First Circuit Court decision vacating in part and remanding *Badillo Santiago*. *See Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1 (1st Cir. 2004). The First Circuit Court in *Badillo-Santiago* specifically stated that in *Tennessee v. Lane*, 124 S.Ct. 1978 (2004) the U.S. Supreme Court held that Congress did validly abrogate states' sovereign immunity to certain constitutionally-based claims under Title II of the ADA. *Badillo-Santiago*, 378 F.3d at 5. It follows that the case on which the Court in the instant case based its decision for dismissing Plaintiff's claims under Title II of the ADA has been effectively vacated and is no longer good law.

However, Defendants argue that this Court's Opinion and Order in Docket # 81 should not be amended since Plaintiff failed to timely appeal said final decision and because the orders issued in Docket # 92 effectively terminated the instant case (Docket # 95). We disagree with Defendants. Although this Court's orders in Docket # 92 disposed of many pending motions, Plaintiff's first motion for reconsideration remained pending (Docket # 85). Thus, since there was a Rule 59(e) motion pending before the Court (Docket # 85), the case remained within this Court's jurisdiction and Plaintiff had the right to adjudication and his time for appeal remained tolled. *See* Fed. R. App. P. 4(A). Therefore, we find that it is within this Court's discretion and jurisdiction to issue a ruling on Plaintiffs second motion for reconsideration. Accordingly, pursuant to Rule 60(b)(5) and for the reasons stated herein, the Court hereby **GRANTS** Plaintiff's second motion for

reconsideration and reinstates Plaintiff's cause of action under Title II of the ADA.

Conclusion

Plaintiff's first motion for reconsideration is **GRANTED in part**. Plaintiff is **ORDERED** to file an informative motion by **February 4, 2005** specifying the causes of action that remain pending and the exact place in the Amended Complaint in which these causes of action were first asserted. Plaintiff's second motion for reconsideration is **GRANTED** and the claims under Title II of the ADA are hereby **REINSTATED**. Judgment shall be amended to conform to the changes set forth in this opinion.

SO ORDERED.

In San Juan, Puerto Rico, this 14th day of January, 2005.

/s/ Salvador E. Casellas
SALVADOR E. CASELLAS
United States District Judge

OPPOSITION BRIEF

FILED
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SUPREME COURT, U.S.

No. 06-779

In the Supreme Court of the United States

UNIVERSITY OF PUERTO RICO, PETITIONER

v.

IVÁN TOLEDO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to the Commonwealth of Puerto Rico in the context of public education.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 454 F.3d 24. The opinion of the district court (Pet. App. 26-34) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 6, 2006. On September 27, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 3, 2006 (a Sunday), and the petition was filed on December 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, established a "compre-

hensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). Title II may be enforced through private suits, 42 U.S.C. 12133, and Congress expressly abrogated the States' Eleventh Amendment immunity to suit in federal court, 42 U.S.C. 12202. Congress further defined the "State" governments subject to the ADA to include the Commonwealth of Puerto Rico and other federal territories. 42 U.S.C. 12102(3).

Title II prohibits governments from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public

at large. See 28 C.F.R. 35.130(b)(1)(i), (iii) and (vii).[1] In addition, a public entity must make reasonable modifications in its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7). The ADA does not normally require a public entity to make its existing physical facilities accessible. 28 C.F.R. 35.150(a)(1). Public entities need only ensure that "each service, program, or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). However, building construction or alterations undertaken after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Iván Toledo suffers from schizoaffective disorder, a mental disability. Toledo alleges that, while he was enrolled at the University of Puerto Rico School of Architecture, various University employees discriminated against him on the basis of his disability and refused to provide reasonable accommodations for his disability. Pet. App. 2-4. Toledo subsequently filed suit in federal court against the University and various University officials, alleging violations of, *inter alia*, Title II of the ADA and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. III 2003). Pet. App. 4. Petitioner and the other state defendants moved to dismiss the Title II claims as barred by Eleventh Amendment

[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. III 2003). See 42 U.S.C. 12134.

immunity. *Ibid.* Although the district court initially granted the motion to dismiss, the court reinstated those claims following this Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004). Pet. App. 26-33; see also *id.* at 4-5.

Petitioner and the other state defendants filed an interlocutory appeal on the immunity question, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the United States intervened on appeal, pursuant to 28 U.S.C. 2403, to defend the constitutionality of Congress's abrogation of immunity in Title II in the context of public education.

3. The court of appeals unanimously affirmed. Pet. App. 1-25. The court first held, based on circuit precedent, that Puerto Rico enjoys the same Eleventh Amendment immunity as States, and that petitioner, the University of Puerto Rico, is an arm of the state for purposes of the Eleventh Amendment. *Id.* at 5 n.1. The court further held that Toledo's complaint stated only statutory, rather than constitutional, challenges to petitioner's actions. As a result, under this Court's decision in *United States* v. *Georgia*, 126 S. Ct. 877 (2006), the court of appeals concluded that the question before it was whether Title II of the ADA was proper legislation to enforce the rights guaranteed by the Fourteenth Amendment. Pet. App. 6-12.

The court held that, as applied to education, Title II is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce constitutional rights and to prevent their violation. In so holding, the court of appeals followed this Court's lead in *Lane*, in which the Court addressed Title II as applied to access to the courts in a broad variety of forms and at all levels of government, 541 U.S. at 522-523, 532. Here,

the court of appeals likewise considered whether Title II was proper legislation as "applied to public education generally," rather than only as applied to public universities. Pet. App. 15. The court then concluded that Title II is reasonably tailored to protect the States' important governmental interests while preventing and remedying a "persistent pattern of exclusion and irrational treatment of disabled students in public education," and "the gravity of the harm worked by such discrimination." *Id.* at 24.

ARGUMENT

Petitioner seeks (Pet. 8-26) this Court's review of Congress's authority to abrogate the States' Eleventh Amendment immunity to claims under Title II of the ADA as applied to public education. Further review is not warranted for four reasons.

1. Petitioner seeks this Court's review of Congress's power to authorize suits under Title II "against a State." Pet. i; see Pet. 8-12, 15, 22-25. But petitioner is not a State. Petitioner is a federal territory, subject to Congress's plenary legislative authority over federally controlled land. See U.S. Const. Art. IV, § 3 (Congress is empowered to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

More to the point, as a territory, petitioner does not enjoy the Eleventh Amendment immunity that the petition seeks to vindicate (see Pet. 1, 14-16, 24). While the First Circuit has held that petitioner enjoys Eleventh Amendment immunity, see Pet. App. 5 n.1, that decision finds no home in the text of that Amendment, its historical genesis, or purpose. Federal territories, unlike States, do not enter the Union "with their sovereignty

intact." *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991). Their relation with the federal government and the level of control that Congress exercises over them are in substantial tension with the federalism considerations that underlie Eleventh Amendment jurisprudence.

> The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. * * * Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.

National Bank v. *County of Yankton*, 101 U.S. 129, 133 (1879).

Furthermore, even if petitioner retained some form of sovereign immunity, there is substantial doubt that the Constitution would constrain Congress's authority to abrogate that immunity in the same manner and to the same extent that the Eleventh Amendment cabins congressional power. See, *e.g.*, *Palmore* v. *United States*, 411 U.S. 389, 398 (1973) (Congress may "legislate for the [territories] in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8.").

At a minimum, those constitutional questions concerning (i) what, if any, form of sovereign immunity petitioner enjoys, and (ii) what power Congress has to abrogate any immunity enjoyed by federal territories pose significant, and perhaps insurmountable, threshold barriers to resolution of the question for which petitioner seeks this Court's review. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993) (reserving the question of whether Puerto Rico enjoys Eleventh Amendment immunity). Notably, petitioner does *not* contend that the question of Congress's power to abrogate any territorial immunity warrants this Court's review, and it does not. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (when confronted with two constitutional questions, Court must resolve the question with narrower constitutional reach first).

2. There is no conflict in the circuits that warrants this Court's review. Indeed, to the government's knowledge, no other court of appeals has addressed the question of Congress's authority to subject territories (or United States' possessions) to suit for damages under Title II of the ADA.

Nor is there any conflict in the courts of appeals on the general question of whether Title II is appropriate Section 5 legislation as applied to public education. To the contrary, every court of appeals to address that question has, like the court of appeals here, upheld the constitutionality of Congress's abrogation in the educational context. See *Bowers* v. *NCAA*, No. 05-2262, 2007 WL 270098 (3d Cir. Feb. 1, 2007); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Association for Disabled Americans, Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005);

see also *Phiffer* v. *Columbia River Corr. Inst.*, 384 F.3d 791 (9th Cir. 2004) (upholding Title II's abrogation in all applications), cert. denied, 126 S. Ct. 1140 (2006).

Petitioner contends (Pet. 10-15) that the courts of appeals are divided over Congress's authority to abrogate the States' Eleventh Amendment immunity for constitutional rights that are not subject to heightened scrutiny and that are not independently violated by the governmental action in question. This Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), however, made clear that the question of congressional power should not be resolved at that level of generality. See *id.* at 515, 530-531. None of the court of appeals cases upon which petitioner relies (Pet. 6-15)—at least none that remains good law, see Pet. 13 (relying on vacated decisions)—adopts or endorses the sweeping bright-line distinction between rights subject to heightened scrutiny and those subject to rational-basis review that petitioner advocates. Indeed, given that the Fourteenth Amendment, including its provision for congressional enforcement, was adopted nearly a century before this Court began to identify and apply varying tiers of constitutional scrutiny, petitioner's proposed limitation on constitutional text is particularly suspect.

Furthermore, there could be no genuine conflict along the lines petitioner posits because not only history, but also this Court's precedent would preclude it. Rights subject to rational basis review are not immune from constitutional infringement, see *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), and that is particularly well established in the context of education, see *Plyler* v. *Doe*, 457 U.S. 202 (1982); cf. *Honig* v. *Doe*, 484 U.S. 305, 309-310 (1988). This Court unanimously underscored last Term that "no one doubts

that § 5 grants Congress the power to 'enforce . . . the provisions' of the [Fourteenth] Amendment by creating private remedies against the States for *actual* violations of those provisions." *United States* v. *Georgia*, 126 S. Ct. 877 (2006) (quoting *Lane*, 541 U.S. at 559). Furthermore, this Court has already upheld Section 5 legislation enforcing rights subject to rational basis review.[2]

Petitioner's reliance (Pet. 11) on the Eighth Circuit's decision in *Klingler* v. *Director, Department of Revenue*, 455 F.3d 888 (2006), is misplaced. That case held only that Title II's abrogation of Eleventh Amendment immunity in the narrow context of proscribing nominal surcharges for handicap parking placards is not appropriate Section 5 legislation. *Id.* at 896-897. Nothing in the court's opinion mentions, let alone disapproves, Title II's application to the educational context.

In any event, even if (contrary to precedent) the distinct constitutional status of the *States* warranted the differential treatment of constitutional rights that petitioner advocates, that question would be better addressed in a case where a *State* asserts Eleventh Amend-

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[2] See *Lane*, 541 U.S. at 513-514 (sustaining Title II as applied to a court reporter who had been denied employment opportunities); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (sustaining under Section 5 the extension of Title VII's ban on gender discrimination to the States at a time when no majority of the Court had yet held that gender discrimination warrants heightened scrutiny); compare *Oregon* v. *Mitchell*, 400 U.S. 112, 285-287 (1970) (Stewart, J., joined by Burger, C.J., & Blackmun, J.) (upholding Congress's ban on durational residency requirements for voting, 42 U.S.C. 1973aa-1(a)(5)); *id.* at 236-239 (opinion of Brennan, White, Marshall, JJ.) (same); *id.* at 147-150 (opinion of Douglas, J.) (same), with *Carrington* v. *Rash*, 380 U.S. 89, 91 (1965) (subjecting residency requirement to rational-basis review); but see *Evans* v. *Cornman*, 398 U.S. 419, 422 (1970) (suggesting a need for "close constitutional scrutiny").

ment immunity, since the question with respect to a federal territory like petitioner would require different constitutional analysis.[3]

3. An exercise of this Court's certiorari jurisdiction is particularly unwarranted here because Toledo's complaint pled a parallel claim for relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. III 2003), which prohibits the same conduct and provides the same remedies as Title II of the ADA. See note 1, *supra*; 42 U.S.C. 12133 (providing that the remedies under Section 504 "shall be the remedies * * * this subchapter provides to any person alleging discrimination on the basis of disability in violation of" Title II of the ADA). The First Circuit—like every other court of appeals to consider the question—has held that the acceptance of federal financial assistance under Section 504 waives any claim to Eleventh Amendment immunity that a State or a federal territory might assert. See, *e.g.*, *Nieves-Márquez* v. *Puerto Rico*, 353 F.3d 108 (1st Cir. 2003). A holding that petitioner is constitutionally immune to suit under Title II thus would have no effect on petitioner's substantive liability or the scope of remedies available against it in this litigation. This Court

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[3] For that same reason, petitioner's concern about other aspects of how the congruence-and-proportionality analysis is applied (Pet. 16-19) begs the constitutional question of whether or to what extent that same congruence-and-proportionality analysis might limit federal legislation with respect to federal territories. In any event, petitioner documents no conflict in the courts of appeals on those questions. Indeed, the main conflict that petitioner asserts in the resolution of those questions is between the court of appeals' answers and the position advocated by petitioner itself. See, *e.g.*, Pet. 18 ("[T]he Court of Appeals concluded that the appropriate class [of cases under consideration] included all levels of education, whereas the University argues that the appropriate class should be limited to higher education.").

should not exercise its certiorari jurisdiction for the purpose of granting ineffectual relief and, in particular, should avoid granting certiorari to decide important questions of constitutional law that are not "absolutely necessary to a decision of the case," see *United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 785 (2007).

4. For the reasons explained by the United States in its briefs on the merits in *Lane*, *supra*, and *Georgia*, *supra*, the decision of the court of appeals is correct. Indeed, this Court in *Lane* held that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." 541 U.S. at 529. In so holding, the Court specifically noted the "pattern of unequal treatment" of the disabled in, *inter alia*, "public education." *Id.* at 525 & n.12. Petitioner, in fact, concedes the "shameful" and "extensive record of discrimination" in public education against disabled children. Pet. 20. Petitioner simply insists (*ibid.*) that unconstitutional discrimination by governments against students for the first thirteen years of their education has no logical relationship to unconstitutional treatment in the fourteenth year. Congress could reasonably conclude otherwise. Cf. *Gaston County* v. *United States*, 395 U.S. 285 (1969) (upholding federal ban on literacy tests because it combats the enduring effects of past discrimination). And, given the "gravity of the harm" that unconstitutional treatment and discrimination in education can inflict, *Lane*, 541 U.S. at 523, Title II's calibrated measures are reasonably tailored to preventing and remedying violations of the Fourteenth Amendment's substantive protections in the context of education.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2007